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Report of the International Law Commission on the work of its fiftieth session (1998)

Topical summary of the discussion held in the Sixth Committee of the General Assembly during its fifty-third session prepared by the Secretariat

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Introduction

1. At its fifty-third session, the General Assembly, under the recommendations of the General Committee, decided at its 4th plenary meeting, on 15 September 1998, to include in the agenda of the session the item entitled "Report of the International Law Commission on the work of its fiftieth session"[1] and to allocate it to the Sixth Committee.

2. The Sixth Committee considered the item at its 13th to 22nd, 32nd and 34th meetings, from 26 to 29 October, and from 2 to 5 and on 17 and 19 November 1998. The Chairman of the International Law Commission at its fiftieth session, Mr. Joao Clemente Baena Soares, introduced the report of the Commission: chapters I to V at the 13th meeting, on 26 October; chapters VI, VIII and IX at the 17th meeting, on 29 October; and chapters VII and X at the 19th meeting, on 3 November. At its 34th meeting, on 19 November, the Sixth Committee adopted draft resolution A/C.6/53/L.16, entitled "Report of the International Law Commission on the work of its fiftieth session". The draft resolution was adopted by the General Assembly at its 83rd meeting, on 8 December 1998, as resolution 53/102.

3. By paragraph 17 of resolution 53/102, the General Assembly requested the Secretary-General to prepare and distribute a topical summary of the debate held on the Commission's report at the fifty-third session of the Assembly. In compliance with that request, the Secretariat has prepared the present document containing the topical summary of the debate.

4. The document consists of seven sections: A. International liability for injurious consequences arising out of acts not prohibited by international law (Prevention of transboundary damage from hazardous activities); B. Diplomatic protection; C. Unilateral acts of States; D. State responsibility; E. Nationality in relation to the succession of States; F. Reservations to treaties; and G. Other decisions and conclusions of the Commission.

[1] *Official Records of the General Assembly, Fifty-third Session, Supplement No. 10* (A/53/10) and corrigendum.

Topical summary

A. International liability for injurious consequences arising out of acts not prohibited by international law (Prevention of transboundary damage from hazardous activities)

1. General comments

(a) Comments on the draft articles as a whole

5. Delegations welcomed the significant progress achieved on this topic during the Commission's last session and expressed their appreciation for the outstanding contribution of the Special Rapporteur which had led to the completion of the first reading of the draft articles on international liability for injurious consequences arising out of acts not prohibited by international law (Prevention of transboundary damage from hazardous activities). The hope was expressed that the Commission would be able to conclude its consideration of the draft articles during the current quinquennium.

6. Support was expressed for the structure as well as the main thrust of the text. The point was made that the draft, and particularly articles 10, 11 and 12, struck a judicious balance between the interests of States of origin and those of States likely to be affected. There was also a view, however, that this was not always the case.

7. While emphasis was placed on the importance of the draft for the protection of the environment, it was also observed that transboundary harm could occur in other areas, including through electronic and digital means.

8. There was the view that further attention should be paid in the draft to the special interests of developing countries. Thus, the inclusion of an explicit provision on the provision of technical and financial assistance to developing countries was advocated. It was argued, moreover, that the text failed to embody important principles such as the sovereign right of States to exploit their own natural resources according to their own policies, the concept of common but differentiated responsibility and the international consensus on the right to development; it was also considered unfortunate that none of the draft articles had been devoted specifically to the need for an overall balance between environmental and developmental imperatives. On the other hand, it was pointed out that "over-nationalization" of standards would hamper uniform application and possibly defeat the goal of the exercise.

9. It was felt that the precautionary principle had not been clearly incorporated in the draft.

10. The view was expressed that the draft articles seemed to be premised upon a highly centralized State with comprehensive regulatory powers; it would be difficult or even impossible to implement those principles effectively in federal States, where regulatory authority was shared.

(b) Final form of the draft articles

11. On this point some delegations expressed preference for a framework convention, arguing that States would be bound by the provisions of such an instrument without losing the freedom to conclude more detailed bilateral or multilateral agreements with respect to specific hazardous or harmful activities or geographical regions with a high concentration of such activities. Others favoured a convention, since that was the only way of providing a solid enough basis for rules on hazardous activities. While the option of a model law received some support, the argument was also put forward that the residual character of the draft militated against its adoption in such form. The possibility of elaborating guidelines forming the framework for regional arrangements was also put forward. There was also the view that any decision on the final form of the draft articles was premature.

(c) Consequences of the failure to comply with prevention articles

12. Although viewing prevention as an obligation of conduct and not of result, several delegations considered that the breach of such obligation was governed by the rules on State responsibility. It was pointed out that this was the case even if the breaches of the primary rules of prevention did not cause actual harm, or could not be shown to have a causal connection with any actual harm suffered. It was added, however, that under such circumstances the consequences of responsibility would be different in scale and in kind than if harm had actually occurred as a result of the breach, in which case full reparation was due. In this connection, the point was made that it was often difficult to establish the causal link between the breach and the occurrence of the damage.

13. It was stressed that the above approach did not exclude the civil liability of the operator who had actually caused the damage, in particular when relevant conventions were applicable. There was also the view that the breach of the obligation of prevention which had resulted in transboundary damage entailed *either* State responsibility *or* civil liability, *or* both. It was believed, however, that since all duties of prevention had been couched in the draft articles in terms of obligations upon States, there was no need for the Commission to address issues relating to the civil liability of the private operator involved in any given context.

14. On the other hand, the question was raised as to how failure to perform a duty that had not resulted in an effect could give rise to an actionable cause. It was also felt that the draft articles should not call for penalties in cases where States had failed to comply with the obligation of prevention, whether or not transboundary damage had occurred. A further view was that sanctions should apply only where a State or operator deliberately failed to comply with such obligation and not in case of lack of capacity to do so.

15. There was also a view that it was important to establish solid legal bases for measuring compliance and identifying the degree of violation, rather than resort to theoretical discussions about "obligations of conduct".

(d) The Commission's approach to the topic of international liability

16. Support was expressed for the Commission's decision to separate the regime of prevention from that of liability, and to focus first on the former. It was argued that the completion, at the Commission's last session, of the first reading of the draft articles on prevention was evidence of the wisdom of that approach.

17. A view was expressed that since work on the issue of liability would require the establishment of a separate regime for each category of hazardous activity, residual rules would be of little use; the problem was even more complex with respect to activities which actually caused significant harm. It was therefore proposed that consideration of the topic of liability should be postponed until the Commission had considered the issues relating to international environmental law mentioned in paragraph 43 of its report.

18. On the other hand, a number of delegations made the point that emphasis on prevention should not lead to a deviation from the original objectives regarding this topic. Thus, several delegations urged the Commission to proceed with the question of liability. It was argued, in this connection, that principles concerning prevention could not be determined in isolation from the principles concerning liability; indeed, it was important to be realistic and also have a regime which dealt adequately with the consequences of harm when it nonetheless occurred. It was further stated that the basic assumption of the topic, that the competing rights and interests of States were best adjusted without the need to determine wrongfulness, required primary rules of liability to be formulated in conjunction with primary rules

of prevention. The Secretariat's valuable survey of liability regimes showed that developing State practice since the Commission had first taken up the topic confirmed that this basic assumption was fully justified. The importance of the principle of compensation of innocent victims was also emphasized.

19. The view was expressed that the principles regarding liability applied irrespective of the level of development of the State concerned, although this factor could be taken into account in the determination of payable compensation. The point was also made that a State's capacity to prevent or minimize the risk of causing harm should be a fundamental criterion in determining liability.

20. It was observed that the study of the question of liability should not be limited to State liability, but should also address principles of civil liability and the relationship between the two. Some delegations considered that the principle of strict liability should apply to States. Others felt that it might be more appropriate to assign primary liability on the operator and only a secondary liability to the State. It was thus argued that the activities of the primary actors should not escape attention; the person responsible for pollution or harm should bear direct and consequential costs, as required by a number of international instruments.

2. Comments on specific draft articles

Title of the draft articles

21. There was a view that the title of the draft articles would be improved by inserting the word "potentially" before "hazardous", for in cases where transboundary damage was preventable, the activity should not necessarily be deemed hazardous. Another suggestion was to change the title in order to emphasize the underlying notion of environmental damage inherent in the reference to harm caused through physical consequences.

Article 1. Activities to which the present draft articles apply

22. There was support for the Commission's decision to formulate article 1 in general terms rather than spell out a list of activities within the scope of the draft articles. The view was however expressed that, at a later stage, a list of such activities might prove useful in resolving lingering conceptual difficulties. The concern was further voiced that in the absence of any specification many hazardous activities which were crucial for development might be covered by the draft. Questions were also raised as to the decision to include neither ultrahazardous activities nor activities which actually caused harm within the scope of the draft. There was also the view that the scope should be limited to particularly hazardous activities. It was suggested that there should be included in article 1 a reference to the risk of causing significant harm to an ecosystem.

23. The view was expressed that the scope of application appeared to be defined adequately by means of a threshold applying to both risk and harm. While some felt that the controversy surrounding the term "significant" had been settled during the negotiation of the 1997 Convention on the Law of the Non-navigational Uses of International Watercourses, and that the Commission was therefore justified in using this term in the current draft, others felt that its meaning was still unclear and that the Commission should take another look at the matter. It was even proposed that the term should be deleted altogether. Concern was further expressed that the interpretation of the expression "significant harm" in the draft articles would have an impact on the interpretation of that phrase in the context of the 1997 Convention.

24. There was also a suggestion to replace the phrase "risk of causing significant harm" with "significant risk of transboundary harm", as it was felt that the former wording unnecessarily blurred the exact legal interrelationship of the crucial elements of the risk, probability and consequence of the injurious event. It was added that the related assumption in paragraph (13) of the commentary to article 1 that the core concern of the draft articles was future harm as against present, or ongoing, harm, was not fully convincing and reflected a basic conceptual weakness in the Commission's approach. The proper distinction was rather between events that were certain and those that were less than certain, and possibly quite improbable.

Article 2. Use of terms

25. The definition in paragraph (a) was welcomed by some delegations. However, the view was expressed that it lacked precision, which was considered particularly disturbing in the light of the fact that the scope of the draft could encompass a wide range of activities crucial for development. There was a suggestion to replace the phrase "a low probability ... other significant harm" either by "any risk within a range extending from a high probability of causing significant harm to a low probability of causing disastrous harm", or by "a low probability of causing disastrous harm or a high probability of causing significant harm and any risk lying between the two extremes".

26. Support was expressed for the inclusion of paragraph (b).

27. As regards paragraph (c), the extension of the scope of the draft beyond activities in the territory of a State to those within the jurisdiction or control of a State was welcomed by some delegations. Others however considered such scope to be still too restrictive; it was argued in particular that the International Court of Justice, in its advisory opinion on the *Legality of the Threat or Use of Nuclear Weapons*,[2] had referred to prevention specifically in relation to areas over which no State had sovereignty. In this connection, it was proposed that the Commission explore the feasibility of an entity or institution being empowered to act on behalf of the international community in the event of damage to the global commons, perhaps through the establishment of a high commissioner on the environment.

Article 3. Prevention

28. Several delegations agreed with the Commission that prevention was an obligation of conduct and not of result. It was observed that such obligation was appropriately based not on an absolute concept of minimization of risk, the limits of which would be very difficult to grasp, but on the crucial requirement of an equitable balance of interests among the States concerned. There was also the view, however, that construing prevention as an obligation of conduct left many questions unanswered.

29. The view was expressed that the concept of "due diligence" should be explicitly mentioned in article 3 and that its nature and scope should be determined more precisely. In this connection, the point was made that this concept involved an objective element, traceable to the fact that hazardous activities carried, as it were, the seeds of their own physical consequences, which could be foreseen with a degree of certitude and precision. It was also stated that article 3 could be enhanced by the addition of elements derived from existing environmental conventions. It was further believed that article 3, like article 7 of the 1997 Convention, should contain a reference to the balance of interests among States concerned, since articles 11 and 12 of the draft only contained procedural provisions. There was the view, moreover, that article 3 should also deal with the obligation to mitigate the effects of harm once it had occurred.

30. It was felt that assistance should be extended to developing countries to enable them to fulfil the obligation in article 3. The point was also made that the economic level of States was one of the factors to be taken into account in determining whether a State had complied with such obligation.

31. The view was expressed that article 3 and the commentary thereto suggested that a State's obligation to prevent "significant transboundary harm" that was bound to occur might be discharged by the State's taking measures either to prevent or to minimize the risk of such harm. The underlying assumption that State conduct involving the risk of inevitable significant transboundary harm did not, as such, also entail that State's obligation to cease and desist from the risk-bearing conduct was considered highly questionable, and a reflection of an anachronistic view of the fundamental balance of States' rights and obligations in situations in which a significant degradation of the environment was involved.

32. Divergent views were expressed on the deletion of the provision contained in article 3 of the text adopted by the Commission's Working Group in 1996 regarding the freedom of action of States and the limits thereto imposed by the general obligation of prevention or minimization of the risk of causing significant transboundary harm.

Article 4. Cooperation

33. Special emphasis was placed on the importance of this article. It was observed that the principle of cooperation underlined the transboundary nature of environmental protection. The point was made that the concept of cooperation in good faith could be strengthened with a view to overcoming any tendency to sideline environmental considerations in favour of political and security interests, for example; thus the Commission might consider the need for a more detailed mechanism to ensure that States upheld the principle in article 4.

34. It was suggested that the article should be split into two separate provisions, one stipulating the principle of cooperation in good faith, the other dealing with the question of the possible assistance of international organizations.

Article 5. Implementation

35. While some delegations expressed support for this article, its usefulness was also called into question.

Article 6. Relationship to other rules of international law

36. Article 6 was deemed to provide an important clarification; indeed it was stated that, while the

[2] *I.C.J. Reports 1996*, p. 242, para. 29.

Commission's work on a comprehensive set of articles on prevention of transboundary damage from hazardous activities deserved full support, other rules and developments in that area of international law should be admitted, and it was important not to make premature commitments concerning the subject. There was also the view, however, that the article, while important in underlining the residual character of the draft articles, did not seem to be informative, particularly when read in conjunction with article 1.

Article 7. Authorization

37. Support was expressed for this article. There was also the view, however, that the criteria for the requirement of prior authorization should be somewhat narrowed. While some delegations welcomed the inclusion of paragraph 2, others considered that the extension of the requirement of prior authorization to pre-existing activities could give rise to major problems with regard to acquired rights and foreign investment, possibly even leading to international claims.

38. The view was expressed that the provision in paragraph 3 was particularly appropriate, as otherwise the principle of prior authorization would lose much of its practical effect. It was felt, nevertheless, that the paragraph required further elaboration in order to define the type of operator referred to in paragraph (8) of the commentary to the article, in view of the legislative and administrative proceedings that could be involved.

Article 8. Impact assessment

39. The importance of this article was underlined by some delegations. However, there was a view that the concept of impact assessment, although worthwhile, should under no circumstances be interpreted as depriving a State of its sovereign right to develop its natural resources in the interests of its economic well-being.

Article 9. Information to the public

40. While some delegations supported the text of article 9, considering in particular that it was in keeping with new trends in international law, others expressed reservations. It was also felt that the provision required further clarification so as to make it more readily applicable.

Article 10. Notification and information

41. Support was expressed for article 10, which was considered to be in line with recent developments in international law. However, it was felt that further clarification would make the provision more readily applicable. While some delegations welcomed the use of the phrase "with timely notification", others believed that all the time-frames mentioned in article 10 were too vague, and expressed their preference for the indication of specific periods. In this respect, six months was considered the maximum acceptable.

Article 11. Consultations on preventive measures

42. The inclusion of the article was welcomed. It was felt that an appropriate balance between the interests of the States concerned was maintained by emphasizing the manner in which, and the purpose for which, the parties entered into consultations.

Article 12. Factors involved in an equitable balance of interests

43. Support was expressed for the provisions in article 12, which, it was noted, provided significant guidance to States. It was further felt that the article took into account the problems of developing countries as regards availability of means of preventing harm. The point was made, however, that the text contained an unnecessary repetition, which could lead to confusion: thus harm to the environment, mentioned in paragraph (c), was already covered by paragraph (a). There was also the view that activities which involved a risk of harming the environment should not be merely one of the factors involved in an equitable balance of interests, but should be simply forbidden.

Article 13. Procedures in the absence of notification

44. Satisfaction was expressed with the text of article 13. However, there was also the view that the term "reasonable time" in paragraph 2 was too vague, and preference was expressed for a specific time limit not to exceed six months. A question was raised as to the rationale for including the additional and somewhat ambiguous elements contained in paragraph 3.

Article 14. Exchange of information

45. Article 14 was welcomed, as it was considered to be in keeping with new trends in international law.

Article 15. National security and industrial secrets

46. It was felt that article 15 struck an appropriate balance between the various interests involved.

Article 16. Non-discrimination

47. The view was expressed that article 16 was a central provision, which would substantially reduce the possibility of disputes between States and facilitate the implementation of the draft articles. There was also the view, however, that the provision could merely serve as a guideline for progressive development of the law, since it could only be effectively implemented where the legal systems of States concerned were compatible. It was suggested that the phrase "who may be or are exposed to the risk of" should be replaced by "who have suffered, as a result of non-compliance with the duty of prevention".

Article 17. Settlement of disputes

48. The inclusion of article 17 was welcomed. It was observed that compulsory recourse to a fact-finding commission was a sufficiently flexible procedure and might be useful for the purposes of establishing and assessing facts relevant to the dispute. The point was made that the details concerning the composition and functioning of the fact-finding commission could be laid down in a separate annex and that the provisions of article 33 of the 1997 Convention might serve as a model in this respect. The question was raised, however, as to why initiation of the procedure should be delayed for six months in the absence of an agreement between the parties.

49. Some delegations held the view that the nature of the topic was such as to make the inclusion of binding mechanisms absolutely essential. Views were divided, however, as to whether arbitration or judicial settlement constituted the preferred option.

50. Other delegations were opposed to the establishment of a compulsory procedure for dispute settlement, believing that potential disputes under the draft articles were more amenable to resolution through negotiation or consultation. Recourse to a conciliation commission was also suggested as a possible method. It was further argued that the above means allowed for a more expeditious settlement of potential disputes, which was of essence in the area of prevention.

51. There was also the view that the question of the procedures for dispute settlement was closely linked to that of the final form of the draft articles. It was further felt that, since dispute settlement procedures would be covered by the draft articles on State responsibility, they need not be included in those which dealt with prevention and liability.

B. Diplomatic protection

1. General comments

52. Many delegations expressed the view that diplomatic protection was a topic of great practical significance which was ripe for codification and on which there was already a sound body of legislation. The rules of diplomatic protection were closely related to those governing both relations between States and traditional public international law; they clarified the division of competence between States and helped to ensure respect for international law as it related to the protection of foreign nationals in a host State, without prejudice to any other relevant legislation.

53. The remark was also made that the topic of diplomatic protection involved a series of complicated theoretical and practical questions and had an unfortunate history, having been regarded as an extension of colonial power or a system imposed by powerful States on weak States. The Calvo clause had been a kind of legal reaction on the part of Latin American developing countries to the exercise of diplomatic protection by foreign States. With the decision on the *Mavrommatis Palestine Concessions* case, it became a basic principle of international law that a State had a right to protect its nationals when they were injured by internationally wrongful acts of another State and a satisfactory settlement could not be obtained through normal channels. Hence, the purpose of diplomatic protection was to rectify the unfavourable and unjust treatment suffered by a State's nationals as a result of violations of international law by another State. Although it had been abused in the past and would probably be abused in the future, diplomatic protection was not in itself a system used by the big and powerful to bully the small and weak. Practice had shown that diplomatic protection had its advantages and it had been adopted by many States in various regions.

54. Some delegations disapproved the idea put forward by the Special Rapporteur that diplomatic protection should be recognized not as an inter-State institution of international law but as an arrangement under which the State acted as agent for its injured national. In their view, this approach would not be codification of international law but a radical reformulation of it. They found it hard to see what benefit would flow from it. In their view the traditional conception of diplomatic protection — that the State, by taking up the case of one of its subjects, was asserting its own right — should be retained. The question whether the State that exercised diplomatic protection was protecting its own right

or that of its injured national was a rather theoretical one, and might not be useful to the debate.

55. On the other hand, the view was expressed that the Special Rapporteur had correctly identified one of the major issues relating to the topic, namely, whether the rights involved in diplomatic protection belonged to the State or to the individual. While it was clear that the right to invoke diplomatic protection belonged to the State, the right itself, as suggested in the Special Rapporteur's report, belonged to the individual. As views on that subject had evolved a great deal over the past 30 or 40 years, his delegation believed that the question should be considered not only from the standpoint of customary law, but also in the light of current practice. The comment was made that the Commission's decision to tackle the whole question of diplomatic protection, including the protection of companies or associations as well as persons, could create difficulties. It would be prudent to limit the first part of the Commission's work to the general aspects of the issue and the protection of physical persons, where codification would not be too difficult. The protection of companies or associations could be tackled later on. That approach would have the advantage of ensuring that rules relating to physical persons could be codified unhampered by disputes over protection for companies and associations, which might hold up all the work relating to diplomatic protection.

56. It was noted with regret that it had not yet been possible to produce draft articles that could provide a focus for the Commission's future debates. If the Commission intended to abide by its own schedule of work, it should consider specific, more narrowly defined issues rather than engaging in yet another round of general discussions.

57. A suggestion was made that the title should be amended, as the phrase "diplomatic protection" connoted traditional State-to-State relations and appeared to be easily confused with the law on diplomatic relations, which had the protection of diplomatic rights and duties as its main purpose.

58. A comment was further made that the relationship between State responsibility and diplomatic protection needed further elaboration because of the large common ground that existed between the two concepts.

2. Diplomatic protection as "primary" or "secondary" rules

59. Many delegations noted with satisfaction that the Commission had decided to confine its study to the codification of secondary rules, which were procedural in nature. The Commission should establish as a precondition the existence of a wrongful act of the State, but its study should not extend to the content of the international obligation that had been breached.

60. Many delegations supported the conclusion of the Working Group that the customary law approach to diplomatic protection should form the basis for the Commission's work on that topic.

61. The view was also expressed that international law could not be placed in watertight compartments of "primary" and "secondary" rules. The Commission should discuss primary rules only where necessary for the appropriate codification of secondary rules. Theories and concepts such as the distinction between primary and secondary rules could not helpfully be discussed before addressing the institutions and rules of diplomatic protection. Furthermore the study of diplomatic protection must also include the study of the means for exercising it, namely, the traditional machinery for the peaceful settlement of disputes and the question of countermeasures.

62. The remark was made that the Commission in its consideration of diplomatic protection should distinguish the two categories of primary and secondary rules as clearly as possible. It was true that part of the doctrine tended to view diplomatic protection as a mechanism allowing the State to act as an agent of its national who had a legally protected interest. That, however, was hardly the approach adopted by chanceries in their everyday work. The Working Group had therefore been right to conclude that the "customary law approach to diplomatic protection" should form the basis for the Commission's work.

63. However, the view was also expressed that the distinction between "primary" and "secondary" rules was useless in the context of diplomatic protection, and it would not be appropriate to focus on the relationship between the international responsibility of States and diplomatic protection since the latter was only one aspect of a much larger field of responsibility.

3. Relationship between diplomatic protection and human rights

64. Some delegations expressed doubts on the prudence of establishing a relationship between human rights and diplomatic protection. They believed that the Commission's work should not entail the assimilation of the two institutions or the establishment of a hierarchy between them. That was

not to say, of course, that the Commission should not study the rights covered by diplomatic protection, including human rights, but rather that human rights and diplomatic protection should not be specifically linked in any draft articles on the topic. The international norms governing the two had overlapping, but intrinsically different, public order functions. In particular, the assimilation of the two subjects had no basis in existing international law and it was doubtful that it would become part of the international legal order in the immediate future.

65. The view was also expressed that international human rights instruments limited the scope of national jurisdiction by guaranteeing uniform standards of protection, whereas diplomatic protection functioned exclusively in relations between States and after domestic remedies had been exhausted. It was further noted that diplomatic protection did not necessarily have any connection with human rights, since it often had to do with questions of inheritance or property. Similarly, human rights protection could be achieved without recourse to diplomatic protection. Moreover, juridical bodies for the protection of human rights, unlike those concerned with diplomatic protection, were well established in both the internal legal order and the international system; that was a matter that the Commission should consider.

66. It was also stressed that the exercise of diplomatic protection would thus remain a right of the State, whereas international human rights protection systems served individual rights. The two mechanisms should remain separate, even if their aims partially overlapped. The Commission should focus on diplomatic protection and should not prejudge questions relating to international human rights protection; for example, it should avoid the question whether the exhaustion of local remedies included the opportunities offered by international human rights protection systems.

67. The comment was also made that the work on diplomatic protection should take into account the development of international law in increasing recognition and protection of the rights of individuals and that the actual and specific effect of such developments should be examined in the light of State practice. In that context it was observed that a significant share of the issues falling under the topic of diplomatic protection were human rights issues; all allegations of mistreatment of nationals of one State in another State generally involved the abuse or alleged abuse of human rights. Accordingly, caution must be exercised when trespassing on the regime of human rights law, as a delicate balance existed in that area which must be preserved.

4. Admissibility of claims and preconditions to the exercise of diplomatic protection

68. A number of delegations commented on the issues of admissibility of claims and preconditions to the exercise of jurisdiction. The first precondition was that there must be a proof that an injury had been inflicted on a national, that the injury was a breach of international law, that it must be imputable to a State and that a causal link existed between the wrongful act of the State and the injury. The second precondition was somewhat more complex, i.e., that injured subjects must have been unable to obtain satisfaction through domestic remedies. The second precondition should be studied in the light of the development of international law and the options available to individuals who had suffered injury. The Commission should address the question as to whether the resort to an international body to protect human rights must be considered a "local remedy", even though a simple textual interpretation could not answer the question in the affirmative.

69. It was also stated that it would be particularly interesting to analyse the possible impact of the new dispute settlement procedures established in some international instruments which gave aliens direct access to foreign courts. The clearest example of that was in agreements on protection of investments. Such new rights for the individual which eliminated the role of the individual's own State had obvious repercussions for the traditional treatment of diplomatic protection. The effect could be bad as well as good, since it could give rise to inequality: whereas a foreigner had various avenues of recourse open to him, the national of a State might be able to resort only to his own domestic courts. The Commission should look into such developments and establish rules that would protect the whole range of rights and obligations, which had so many political implications.

70. A remark was made that the Commission in its consideration of the topic should place greater emphasis on the rule regarding the exhaustion of domestic resources. That principle, which was a well-established rule of customary international law, should be fully honoured in the draft articles, but did not seem to have been given due importance, despite its inclusion in a number of recent treaties.

71. It was stated that the Commission should not attempt to define the relationship between the nationality of natural or legal persons and the conditions under which such nationality had been granted. The Commission should not consider the question whether the individual had respected the law of the State in whose territory he or she was. It

would be useful to stress the conditions under which the individual's behaviour might exempt the host State from responsibility.

5. Whether diplomatic protection is a discretionary right of a State

72. Many delegations expressed the view that the exercise of diplomatic protection was the right of the State. In the exercise of that right, the State should take into account the rights and interests of its national for whom it was exercising diplomatic protection. It was agreed that the discretionary right of the State to exercise diplomatic protection did not prevent it from committing itself to its nationals to exercise such a right.

73. In asserting the right to diplomatic protection, the State took into account not only the interest of its national who had suffered injury because of a wrongful act of another State, but also a number of issues related to the conduct of its foreign policy.

74. In this connection it was stressed that clearer reference should be made to the view that the exercise of diplomatic protection in certain cases could become secondary to foreign policy considerations deemed substantial enough to justify overriding the relative importance of such protection. The fact that State practice appeared to bear out that position indicated the need to introduce some element of hierarchy into the weighing of a State's interest or obligation concerning the protection of its nationals against its wider diplomatic or political interests, particularly in the case of human rights issues. In certain cases, however, arrangements to realize an individual's right to protection could be better achieved between the two States concerned through the diplomatic channel. Consideration might later be given to situations in which a State was placed in an unnecessary position by an individual who made a wrongful claim or a claim that was unfounded in international law.

75. The remark was also made that it was necessary to examine the consequences of that shift in perspective for individual rights. Three such consequences could already be observed: first, presentation of a claim of diplomatic protection was not always left to the discretion of the State; in many cases, there was an element of compulsoriness; secondly, distribution of the compensation obtained was not always left to the discretion of the State; and thirdly, the damage invoked in claims presented by the State did not always differ from the damage sustained by the individual. The shift in perspective was evident, for example, in bilateral investment protection treaties and the International Centre for Settlement of Investment Disputes (ICSID) Convention. In current practice, the State most often acted as the agent of the individual in providing a channel for an international claim where no direct channel existed.

76. The comment was made that it was essential to take the views of the developing world into account. There was a clear need to distinguish between the possession by States of diplomatic protection rights and their consequent exercise of such rights in regard to individuals under their protection. It was a State's sovereign prerogative to protect the rights and interests of an individual who was linked to it by nationality. However, since a State might fail to pursue the cause of such an individual for reasons beyond the individual's control relating to the relative influence possessed by the State of nationality of the individual in the international arena, the Commission should take into account the need to establish guidelines on the discretionary power of States to provide diplomatic protection.

C. Unilateral acts of States

1. General comments

77. Many delegations underlined the importance of the study of the topic, its intrinsically complex nature, the many diverging views which existed on the meaning of "unilateral acts" in theory and practice and the great increase in the number and types of unilateral acts which had taken place in recent years. An in-depth examination of the topic, it was said, could be of great assistance in the orientation of State practice. The development of rules or guiding principles, it was also said, would help to clarify various aspects related to the unilateral acts of States.

78. Support was expressed for the progress already achieved by the Commission at its initial stages of the topic's consideration and for the first report of the Special Rapporteur. The suggestion was made that the Commission could next focus on aspects concerning the elaboration and conditions of validity of unilateral acts.

79. A view was expressed, on the other hand, that the preliminary report and its discussion in the Commission appeared to leave the topic at once both too narrow and too broad. According to this view the Commission should focus its preliminary studies far more closely on the main practical problems that needed to be examined. Without that as a basis for future decisions it was doubtful whether the Sixth

Committee would be in a position to decide whether detailed work on the topic would be well-founded or feasible.

80. According to another view, the Commission was not in a position to achieve much progress on the topic since some of its members considered unilateral acts to be a source of international law while others saw them as a source of international obligations.

2. Definition of unilateral acts and scope of the topic

81. Support was expressed for the elements of the definition of unilateral acts suggested in the Commission's report, which viewed unilateral acts as an autonomous, unequivocal and notorious expression of the will of a State which produced international legal effects. This definition, it was said, provided an interesting basis for further work, in particular, for delimiting the scope of the topic.

82. The primary question, it was said, was whether the act of the State had been intended to produce legal effects vis-à-vis one or more other States which had not participated in its performance and whether it would produce such effects if those States did not accept its consequences, either explicitly, or as implied by their subsequent behaviour.

83. The autonomous element of a unilateral act was stressed by some delegations as essential in the sense that such acts were capable by themselves of producing legal effects under international law and did not depend for this purpose either upon the performance of another act by some other State or upon its failure to act.

84. In connection with the basis of the binding nature of unilateral acts, one view stressed the principle of good faith and the desirability of promoting security and confidence in international relations. It was also stressed that the obligatory nature of such acts was dependent on the intention of the State which performed them rather than on another State's legal interest in compliance with the obligations it created.

85. Several delegations underscored the need to delimit the scope of the topic from the outset so that the analysis would be more thorough and could progress more rapidly. It was necessary to establish a clear framework that could facilitate the Commission's work by identifying the categories of unilateral acts which should be examined by the Commission and those that should not.

86. The importance of the definition of unilateral acts for delimiting the topic's scope was stressed. It was important, it was said, to prevent the scope of the topic from becoming too broad or narrow and to stress the criteria for a unilateral legal act, which must produce legal effects in respect of subjects of international law which had not participated in its performance and must generate legal consequences independently of the manifestation of the will of some other subject of international law. In this connection several delegations supported the view that the Commission's study should be limited to the acts of States which were "strictly" unilateral, i.e., whose purpose was to produce international legal effects and had an autonomous character. That would mean excluding unilateral political acts as well as acts linked to a specific legal regime.

87. Some delegations pointed out that it was not always easy to determine whether a given act was legal or political in nature. International courts, one view maintained, had often made that determination on the basis of the intention of the State and the consequences of the act in question. According to another opinion, the Commission should not take too narrow a view of its future work on the topic. While it could be useful to consider the legal effects of declarations and other formal statements intended to have legal consequences, problems could arise precisely because it was not always clear whether particular words or actions were intended to have such consequences. According to this view, the Commission should broaden the scope of its work and not to confine itself to unilateral statements clearly intended to have legal effects.

88. A view was also expressed that a major difficulty lay in the virtual impossibility of distinguishing between unilateral acts aimed at creating a normative legal obligation and those which were purely political in nature. The suggested focus on the "intention" of the performing State as a leading criterion was problematic since that element did not lend itself to objective evaluation. It would, moreover, be inappropriate to use specific formal criteria to characterize a binding legal declaration. Given the impossibility of finding a more scientific definition of a unilateral declaration, one was forced to come back to the three prior conditions proposed by the Rapporteur: the intention of the declaring State, the circumstances in which the declaration had been made and the contents of the declaration. In practice, however, the first and second criteria were often seen as one because the circumstances were usually perceived as the only means of evaluating intention. In this view, while the importance of the principle of good faith in contractual international relations should be recognized, it should not be considered as an adequate basis for determining the binding nature of a declaration. Contrary to what was the case in the law of treaties, reciprocity was

not needed in the case of a unilateral declaration, nor was any notification of acceptance of the declaration by other States. According to this view, any attempt to classify unilateral declarations within strict categories would run counter to the actual practice in the international arena. Furthermore, any attempt to set strict boundaries would impede political manoeuvring by States, with the inevitable result that practical ways would be found to bypass the restrictions. This view considered it imperative to limit the topic as much as possible and to restrict consideration to the existing international principles of good faith, estoppel and international customs and practice.

89. Several delegations maintained that acts linked to a specific legal regime should be excluded from the Commission's study. Specific mention was made in this connection of acts connected with the law of treaties, such as offer, acceptance, signature, ratification and the formulation of reservations.

90. As regards silence, acquiescence and estoppel, some delegations expressed themselves in favour of including them in the study of the topic, since they could, if only implicitly, have consequences for other subjects of international law.

91. Some other delegations, however, did not think that silence could be viewed as a unilateral act, even though it could be considered a sign of a State's intention to assume legal obligations or to accept a legal situation.

92. As regards estoppel, doubt was expressed that unilateral statements made by the agent of a State in the course of proceedings before an international court or tribunal could be considered to be unilateral acts of the State. It was also pointed out that estoppel did not constitute a truly unilateral act because it was not specifically intended to create an obligation by the State invoking it and because in any case the characteristic element of estoppel was not the conduct of the State in question but the reliance of another State in that conduct.

93. In the view of other delegations, while the Commission, at an initial stage, could confine itself to the study of "strictly" unilateral acts, at a later stage, and in the light of the results achieved in that study, it might examine other less formal expressions of the will of States which were particularly relevant in international practice, such as acquiescence, silence and estoppel.

94. Several delegations addressed the questions whether the scope of the topic should extend to unilateral acts of subjects of international law other than States, such as acts of international organizations or to unilateral acts of States addressed to other subjects of international law.

95. As regards unilateral acts of international organizations, a number of delegations were of the view that these acts should be excluded from the Commission's study. Although they were genuine unilateral legal acts, they were special in character and purpose, required special rules and consequently fell outside of the Commission's mandate. The practical usefulness of including such acts was also questioned. Some of the delegations which were against the inclusion of these acts felt that if they were nevertheless finally included their treatment should be limited in scope.

96. Some other delegations believed that the Commission should not definitively discard the possibility that it might extend the scope of the topic to unilateral acts of international organizations even if at the first stage of its work it should focus on unilateral acts of States.

97. Concerning unilateral acts of States issued in respect of subjects of international law other than States, several delegations did not see the reason why such acts should not be covered by the scope of the topic, especially as in contemporary practice many unilateral acts of States were addressed both to States and to international organizations. A broad approach, it was also said, was clearly preferable, particularly taking into account the growing participation of actors other than States in the international legal process. Consequently, the scope could be extended not only to State acts issued in respect of international organizations but also in respect of other limited subjects of international law.

98. According to another view, while it was too soon to decide whether the scope of the topic should also extend to unilateral acts of States issued in respect of other subjects of international law, the Commission should nevertheless take into account all possible beneficiaries of unilateral acts as it should consider the role of unilateral acts of States in the development of customary international law.

99. Some delegations agreed with the Special Rapporteur and the Commission that unilateral acts giving rise to international responsibility should be excluded from the Commission's study, particularly since the Commission was engaged in the study of State responsibility. Thus, it was pointed out that legal actions, namely the conduct of States, which might be lawful or unlawful and, in the latter case, generated international responsibility, were not intended to establish general or individual rules.

100. In another view, however, although it was true that the Commission was engaged in a specific study of State responsibility, the question of whether and to what extent

a unilateral act might entail State responsibility was of great interest in the context of the present topic. According to this view there was an interesting parallel with the law of treaties. Article 37, paragraph 2, of the Vienna Convention on the Law of Treaties stated that when a treaty created a right for a third State, that right could not be revoked or modified by the parties if it was established that it was intended not to be revocable or subject to modification without that State's consent. It might, then, be considered, *mutatis mutandis*, that if a unilateral act, such as a declaration, was clearly intended to create a right for a third party, the author State could not unilaterally revoke it, and if it did so, it would incur responsibility. According to this view, such questions fell logically within the scope of the Commission's study.

101. Also concerning the scope of the topic, one view stressed that it would be most useful to continue studying the development of the consolidated rules of the law of treaties in order to determine how far they could be adapted to the regulation of unilateral acts. According to this view, it was important to establish a definition of rules of interpretation, both those governing unilateral acts and those that could be applied equally to unilateral acts and to international treaties.

3. Approach to the topic

102. Some delegations endorsed the approach suggested by the Special Rapporteur that the Commission should focus its attention not so much on the "*negotium*" or substantive content of unilateral acts but rather on the "declaration" as a prototype, instrument or formal procedure whereby a State could produce legal consequences in a unilateral manner on the international plane. In this connection, a parallel was drawn between a "declaration" with regard to the law of unilateral acts and the "treaty" in relation to treaty law. These delegations doubted the usefulness of trying to divide unilateral acts into categories such as "protest", "promise", etc.

103. Other delegations did not make a distinction between the formal instrument or declaration and its substantive content. They suggested that the Commission should not limit its study to a single category of unilateral acts, such as declarations, but should work on all the main categories of unilateral acts, such as, for instance, promise, recognition, renunciation and protest.

4. Outcome of the work on the topic

104. There was general support for the Commission's decision to proceed with the consideration of the topic on the basis of the elaboration of draft articles with commentaries to be prepared by the Special Rapporteur in his future reports. This course of action would foster stability and security in international relations and promote clear, concise and systematic codification.

105. The above course of action, it was also stressed, did not prejudge the final outcome of the Commission's work on the topic or on the form which in the end such articles would take, whether a convention, guidelines or recommendations.

106. In this connection, one view was expressed that the final product should be in the form of a guide to practice rather than a draft convention.

D. State responsibility

1. General comments

107. Many delegations noted with satisfaction the progress made by the Commission in its reformulation of the rules on State responsibility. They also expressed support for the Commission's efforts to amalgamate some provisions, or delete articles. It was observed that the draft articles provisionally adopted by the Commission on first reading had already had an impact on State practice and had recently been referred to by the International Court of Justice in a decision. In that regard, several delegations called for the early completion of a generally acceptable instrument on State responsibility. However, the view was also expressed that any major changes would undermine the growing authority that many of the draft articles were acquiring, and that revisions would create undesirable delay in finalizing the draft articles.

108. While there was general agreement on the structure of the draft, the remark was made that Part Two, as it emerged from the first reading, did not seem well organized. Reorganization would therefore appear necessary in order to take into account the choices made in Part One. Concerning the content of the draft articles, support was expressed for distinguishing between "primary" and "secondary" rules, with only the latter being codified. In this regard, reservations were expressed regarding some draft articles because they addressed primary rules. It was noted in this regard that, while there was nothing to prevent the

Commission from stating as a prior condition to its work the existence of a wrongful act by a State, the study should not deal with the content of the international obligation which had been breached.

109. With regard to the form of the draft articles, different views were expressed. Some delegations preferred an international convention as opposed to a declaration or guidelines. In this connection, it was noted that since State responsibility had a central place in international law, to have it established in binding terms, with wide acceptance, would serve to strengthen confidence in the legal dealings between States. On the other hand, the view was expressed that the draft articles should not take the form of a draft convention. An international convention might create unnecessarily rigid rules. One suggestion was to adopt a code of State responsibility that would be similar to a convention by its content while resembling a General Assembly declaration in its binding character. Support was also expressed for the Special Rapporteur's proposal that the question of the form of the draft articles should be deferred.

2. State crime

110. Divergent views were expressed regarding the inclusion of the notion of "crimes" in article 19 as well as the distinction between crimes and delicts. According to one view, State "crimes" should not be included in article 19, inasmuch as that concept did not have a basis in State practice or judicial decisions. International law did not recognize that States could be subjects of criminal responsibility, nor did any mechanism exist to enforce such responsibility. There was no reason, moreover, to include a legal concept which the international community was not yet prepared to accept. It was also unrealistic to introduce the concept of State crime, since the international community was made up of States with equal sovereignty. Furthermore, it was difficult to comprehend that a State that included people in a collective sense could be indicted. Not only had the distinction between "international crimes" and "delicts as internationally wrongful acts" become increasingly attenuated in the draft articles, as far as consequences were concerned, but the concept itself fitted uneasily into a set of secondary rules. Moreover, it was noted that the inclusion of the distinction would delay the Commission's work and had contributed to the doubts expressed as to the advisability of drawing up an international treaty before establishing guidelines or guides to practice. Reservations were also expressed regarding the terminology used in distinguishing between international crimes and delicts. That terminology, which had been taken from penal law, did not adequately describe the different categories of wrongful acts under international law. The remark was made that the best way forward in international law was to try to get universal agreement that particularly heinous behaviour on the part of individuals should be criminalized and to establish the necessary procedures and institutions at the international level to ensure that human beings were called to account for such behaviour. The efforts to establish an International Criminal Court were referred to in this regard.

111. According to another view, the notion of State crime, as expressed in article 19 of the draft, was fundamental. Together with other notions already entrenched in international law, such as those of collective security and *jus cogens*, the notion of State crime constituted one of the pillars for the creation of an international public order and was firmly rooted in the public conscience as a reality which could not be ignored by the law. Furthermore, the distinction between international crimes and delicts existed in law, not only in terms of doctrine but in terms of the sociology of international relations. The international criminalization of "exceptionally serious wrongful acts" was thus intended to strengthen the notion of international public order and to preserve the highest values of humanity. The distinction also took into account the evolution of international society, which was now based on solidarity between States while at the same time reflecting their wish to respond collectively to a violation of society's common values. To abandon such a hierarchy of breaches of international obligations, as had been proposed, would be to disregard that need and to return to the traditional bilateralist approach to the law of international responsibility, which had been concerned solely with repairing the damage suffered by a State as a result of a breach of a primary rule of international law.

112. The view was also expressed that State responsibility was neither criminal nor delictual but international. Any comparison with the criminal responsibility of natural or legal persons under internal law could be misleading. The term "international crime" merely denoted the existence of a special scheme of responsibility with respect to the ordinary regime. The remark was made that, while it was not essential to use the terminology "delicts" and "crimes" to distinguish between wrongful acts and exceptionally serious wrongful acts, a unified regime on responsibility would make it impossible to guarantee that certain particularly serious consequences arose solely and exclusively from the breach of norms protecting the fundamental interests of the international community. It was noted further that the use of the term "crime" had generated problems deriving from

its domestic law connotations. In this connection it was observed that, if there was any real danger of confusion, the use of an alternative expression, such as "exceptionally serious wrongful act", could be envisaged. As to the term "delict", the view was expressed that it lacked a generally accepted significance and, in that sense, its use was perhaps not indispensable. It did, however, provide the necessary contradistinction to "crime" and, were the latter term to be retained, there would be no option but to retain the term "delict" as well. In that context, of the five possible approaches suggested by the Special Rapporteur in relation to the international crimes of States, a preference was expressed for the second, which replaced the expression "international crimes" with "exceptionally serious wrongful acts". Such a solution would avoid the connotations of domestic criminal law. Indeed, some legal codes could not provide for the criminal responsibility of a State, inasmuch as they did not even have provision for the criminal responsibility of legal persons generally.

113. It was observed that, whichever term was selected, it was essential to clarify the legal consequences arising from the violation of the two categories of rules and to determine the degrees of responsibility in each case, in order to establish an objective criterion based not on the damage or blame (*dolus* or *culpa*), but rather on the magnitude of the wrongful act and its effects. It was suggested further that the Commission should consider whether different regimes of international responsibility should be applied, depending on the seriousness of the breach of the international obligation, whether punitive reparations were to be allowed, how claims by States not directly affected were to be dealt with and the relationship between the regime of international responsibility and the United Nations collective security system. However, it was noted that while the Commission would continue to take an "objective responsibility approach" and positive law certainly drew distinctions between certain rights and obligations, such distinctions did not always have to entail automatic distinctions in the consequences, particularly with regard to reparation.

114. It was also observed that the category of crimes might be defined in other ways, for example, by reference to the existence of some specific system for their investigation and enforcement or to their substantive consequences. On the other hand, it was noted that the fact that the Commission had conducted its consideration of the matter not on the basis of the notion of "exceptionally serious wrongful acts" but, rather, on the basis of the specific characteristics of obligations *erga omnes* and obligations arising from peremptory norms (*jus cogens*) and, within the latter category, of "crimes", might be more relevant and useful for the structuring of the regime on international State responsibility.

115. The comment was made that the Commission should address the question of whether there was a hierarchy of international obligations, taking into consideration developments in international law, particularly with respect to *jus cogens* rules and *erga omnes* obligations. In that context, it was observed that while the latter related concepts were much broader notions, "State crimes" were more serious than acts violating rules with a *jus cogens* character. Furthermore, the rules relating to State crimes were not subject to any exception. Violations of *jus cogens*, meanwhile, formed a narrower category than acts contravening obligations *erga omnes*. "State crimes" could therefore not be replaced by either of the other two notions. Therefore, it was proposed that the systematic development of the key notions of obligations *erga omnes* and peremptory norms (*jus cogens*) and a possible category of the most serious breaches of international obligations would resolve the contradiction created by article 19.

3. Requirement of damage

116. It was observed that there was no requirement of damage for a State to incur responsibility for an internationally wrongful act. Questions of damage or fault had been referred to the primary rules and should not be included in article 1. Their exclusion, however, could have a significant impact on the activation of the mechanism of responsibility. Consequently, the remark was made that it might be advisable to review article 1, bearing in mind the definition of "injured State" that might be adopted and the degrees of responsibility that might eventually be established in the draft articles. According to another view, the existence of harm was an indispensable element for triggering State responsibility and therefore the idea that a failure to fulfil obligations was sufficient was subject to criticism.

4. Attribution

117. In response to the Commission's question in paragraph 35 of its report, some delegations observed that all conduct of an organ of a State was attributable to that State under article 5 of the draft articles, irrespective of the *jure gestionis* or *jure imperii* nature of the conduct. It was noted further that the same principle applied even where such acts were committed by the organ *ultra vires*. The remark was made that there was no relationship, as the terms used in the

question might suggest, between whether an act was attributable to a State and whether the State enjoyed immunity from the jurisdiction of foreign courts. Furthermore, as a practical matter, the distinction between the two types of acts was extremely difficult to draw and could considerably restrict the possibility of a State being held responsible for committing an internationally wrongful act. Moreover, no importance was attached to that distinction in international practice and jurisprudence. The comment was made that the issue might also have to be considered further from the standpoint of jurisdictional immunities and diplomatic protection.

118. As to the structure of chapter II of Part One of the draft articles, it was remarked that the draft, and specifically draft article 9, was deficient in terms of consistency and symmetry of language. Furthermore, the relevant draft articles (arts. 5–10) distinguished between conduct of the organ of the State acting in that capacity and conduct by persons, entities or organs of another State involving the exercise of elements of governmental authority of the State. Neither formulation was entirely free of ambiguity and the former, in particular, was potentially problematic since the attribution of one and the same type of conduct to the State might well vary in accordance with a given State's definition of "organ". In the latter regard, reference was made to the deletion of the phrase "under the internal law of that State" after the words "any State organ having that status" in draft article 5. It was observed that even though there might be a justifiable need to ensure that a State did not evade its responsibility through restrictive qualifications based on its domestic laws, the mere deletion of the reference to that law would not resolve the problem. Instead, it would present difficulties, since it was precisely internal law that defined what was considered a State organ. Hence the view was expressed that it was inappropriate to delete the phrase in question, since internal law was of primary importance in defining the organs of a State and its definition could cover both practice and customs. According to a different view, while there was no doubt that internal law would be relevant in certain circumstances, it was not always decisive, and it might be better to refer to internal law in the commentary rather than in the body of the draft articles. The view was also expressed that the responsibility of international organizations and of States for the acts of international organizations should not be included in the current draft articles, since that subject had its own special characteristics.

5. Circumstances precluding wrongfulness

119. It was observed that "circumstances precluding wrongfulness" should not be revisited in the draft articles, as the concept fitted uneasily into a set of secondary rules. Hence, consideration of any legal consequences flowing from State conduct, notwithstanding the existence of circumstances precluding the wrongfulness of that conduct, was clearly beyond the scope of the draft articles on State responsibility, which were predicated on there having been wrongful State conduct in the first place. A further remark was made that the preclusion of the wrongfulness of an act should not in all circumstances preclude compensation for damage caused by that act. As to the preclusion of wrongfulness in the context of countermeasures, the comment was made that it could not be claimed, as had been done in draft article 30, that the wrongfulness of an act of a State was precluded if the act was in response to another wrongful act committed by a wrongdoing State, since that would subvert the system of rules which the Commission was attempting to establish in the field of State responsibility. It was suggested that the Commission should carefully review article 30 and Part Two, chapter III, to ensure that any coercive measure that might be included in the draft articles strictly conformed to the international legal order in force.

6. Countermeasures

120. The remark was made that it was not necessary to draft provisions on countermeasures, which could only be tolerated under international law as an extreme remedy to be taken only in exceptional cases. It was further noted that while the right of States to take countermeasures in response to unlawful acts was permissible under customary international law, the desirability of providing a legal regime for countermeasures was questionable because of the complexity of the issues involved. In this regard, the view was expressed that article 50 did not reflect State practice or customary international law. Moreover, it was noted that the use of countermeasures favoured more powerful States and would potentially undermine any system based on equality and justice. Therefore, the observation was made that a countermeasures regime might warrant a specific study by the Commission, but not as part of the law of responsibility. Alternatively, the view was expressed that the provisions on countermeasures would find their proper place in the articles, since strictly speaking they were not considered a right of an injured State but one of the circumstances precluding wrongfulness, and were a corollary

to the settlement of disputes relating to the exigency of responsibility.

121. With regard to their content, it was noted that, given the lack of an effective, centralized system of coercion, it was inconceivable that an injured State should be prevented from taking countermeasures. In this connection, the comment was made that only States directly injured by a wrongful act should have the right to react and even then they should have to prove that they had suffered harm. However, in order to prevent abuses, it would be prudent for the Commission not only to clarify the rules of customary international law, but also to develop clear rules limiting the circumstances under which States could resort to countermeasures. The following remarks were made in this regard: the application of countermeasures should not adversely affect the rights of third States; the inclusion in the draft articles of an obligation on the part of the injured State to negotiate prior to taking countermeasures appeared to be appropriate; in the meantime, the injured State should confine itself to taking such interim measures as seemed necessary to protect its rights; and the failure of negotiations or of any other peaceful dispute settlement procedure did not entitle the injured State to resort to countermeasures as it saw fit. It was also noted that the interests of the international community required that certain categories of countermeasures be prohibited. The suggestion was made that the Commission should examine the issue further with reference to the recent practice of States, and that it should consider the measures adopted in recent years against "pariah" States which were guilty of violating the fundamental norms of international law. While it was noted that it might be useful for the Commission to also consider the relationship between countermeasures and resort to third-party dispute settlement procedures, which should not necessarily preclude countermeasures, it was pointed out that it might not be practicable to include detailed provisions in that regard.

7. Injured State

122. It was observed that the identification of an injured State pursuant to article 40 was vital in determining the right to claim remedies against the wrongdoing State, including legitimate countermeasures. According to one view, while the term "injured State" in article 40 was ambiguous, the Commission would be wrong to re-examine it only on the basis of the notion of *jus cogens*. The view was also expressed that as currently drafted the provision did not offer a satisfactory response to breaches of obligations *erga omnes*, owing to its inconsistency with article 60 of the 1969 Vienna Convention on the Law of Treaties, which provided more restrictive rules. According to another view, it was important to clarify the notion of injured State as contained in draft article 40, particularly in relation to *erga omnes* obligations, *jus cogens* and State crimes. Hence, it was suggested that the Commission review and clarify the terminology used in regard to the definition of "injured State".

123. The comment was made that it was important to recognize that designating all States as "injured" and granting them a full range of responses to "crimes", including the right to take countermeasures, could lead to abuse. In this regard, it was proposed that the right of response should be given only to States that were directly affected, and that responses to violations of community obligations should be granted according to the proximity of a State to the breach of which it was a victim. It was suggested that the Commission should consider the latter issue and propose objective criteria. In this regard, the point was made that an objective determination of the existence of a breach of a fundamental norm should not be left to the discretion of the State which claimed to be injured. Instead, a suggestion was made that the International Court of Justice was the body which offered the best guarantee of impartiality and which was capable of taking a fully informed decision on the existence of such a breach. Thus a State would first have to show that the right alleged to have been violated was a primary rule in international law and that the parties were bound by that primary rule, whether established by treaty or by customary international law. In the case of the latter, reference was made to the difficulty of determining what mechanisms might be applied when particular provisions were violated, since the choice of enforcement or dispute settlement procedures differed between treaty and customary international law. It was suggested that the general principle seemed to be that, where a multilateral or regional convention had mechanisms for reacting against violations, those mechanisms took priority. Therefore the recommendation was made that the Commission clarify those issues and that it consider the desirability of drafting separate provisions dealing with the two sources of international law rather than combining them.

8. Reparation

124. The issue of reparation was raised in the context of the Commission's question, in paragraph 36 of its report, as to the appropriate balance to be struck in Part Two of the draft

articles between the elaboration of general principles and of more detailed provisions. It was noted in this regard that the approach in the current draft was prone to weaknesses of both excessive generality and misplaced specificity. From the point of view of clarity of the law, detailed regulations might be preferable. However, detailed and comprehensive consideration of the law on reparation and compensation would take considerable time and would delay the completion of the Commission's work. A preference was expressed for emphasizing general principles rather than very detailed and specific provisions, so that the relatively complex subject matter of reparation and compensation could be dealt with in a satisfactory way while allowing enough flexibility for specific cases.

125. According to another view, it was especially important to establish principles concerning the consequences of an internationally wrongful act that would be sufficiently acceptable. Hence more detailed provisions would ensure greater legal security in so sensitive an area as that of international responsibility. Furthermore, chapter II of Part Two would be improved if the content of the articles on compensation and guarantees of non-repetition was broadened by incorporating, in particular, certain norms of customary international law which had entered into international jurisprudence. It was also noted that since compensation, in practice at least, was the most relevant element in making reparation for the injury caused, more detailed provisions on compensation, in particular with regard to the assessment of pecuniary damage, including interest and loss of profits, would be preferable. The comment was also made that although the basic principle established in article 42 was one of full reparation, both article 42 itself and subsequent articles suggested a change in that principle. In this regard, it was observed that article 42, paragraph 2, could be interpreted as a deviation from the full reparation standard and opened the way for abuse by wrongdoing States. Similarly, if compensation was to be the main remedy resorted to following an internationally wrongful act, article 44 was too brief, particularly when contrasted with the more detailed provisions in articles 45 and 46. It was also suggested that, in accordance with the principle of full reparation, the payment of interest should be the basic and general rule for compensation.

9. Dispute settlement

126. With regard to the dispute settlement mechanism envisaged in the draft articles, the comment was made that its effectiveness should not be prejudged on the grounds that States would not accept binding settlement of disputes in that field. Nor could the objection be raised that it would be a specialized system, since there were special regimes for the law of the sea or in the field covered by the International Criminal Court. It was further suggested that the final content of the provisions on the settlement of disputes would largely depend on the manner in which the draft articles were adopted. While the view was expressed that a convention on international State responsibility for wrongful acts should include dispute settlement provisions, according to another view, the provisions on dispute settlement seemed misplaced since there was no reason to single out disputes connected with State responsibility by applying an ad hoc settlement mechanism to them. There were rarely any disputes about responsibility alone, but rather substantive disputes which had consequences for responsibility, and hence it would be better to rely on general international law. In this regard, it was suggested that Part Three of the draft articles should be given the form of an optional protocol, if it could not be deleted.

10. Relationship with other rules

127. Concerning the relationship between the draft articles and other rules of international law, the remark was made that the draft should continue to respect *lex specialis*. In this connection, it was also important to respect the parallelism between the law of treaties and the law of international responsibility, while making clear the complementarity of the draft articles with the Vienna Convention. It was observed that the Commission should draft the articles on the assumption that the rule of *lex specialis* should be transformed into a general principle. Likewise, support was expressed for the notion that where specific treaty regimes provided their own framework for responsibility of States, that framework would ordinarily prevail, regardless of whether the draft articles took the form of a convention or of a declaration of principles.

E. Nationality in relation to the succession of States

1. Nationality of legal persons in relation to the succession of States

128. Several delegations shared the Commission's view that, as the definition of the topic stood, the issues involved in the second part dealing with the nationality of legal

persons were too specific and the practical need for their solution was not evident. It was felt that the low incidence of legal disputes relating to that question in recent cases of State succession showed that it was not a pressing issue, and that in any case it was generally dealt with in the context of private rather than public international law. The point was also made that the future of the second part rested in the hands of Governments in a position to share their practical experience of State succession as it affected the nationality of legal persons; in the absence of comments in that regard, the Commission might do better to turn its attention to other issues. In this connection, a delegation from a country which had recently undergone a succession of States indicated it had not faced any practical problems as regards the nationality of legal persons.

129. Another such delegation, however, argued that problems of this nature had in fact arisen in the absence of relevant international rules and that therefore work on the second part of the topic was of utmost interest. This position received some support.

130. The first alternative approach considered by the Commission, namely, expanding the scope of the study beyond the context of the succession of States to the question of the nationality of legal persons in international law in general, was supported by some delegations, particularly insofar as the question would be addressed as a new topic. The view was expressed that, with countries becoming more and more interdependent economically and the volume of investments growing, the time had come to rethink the traditional approach to the matter. Others did not regard this option as appropriate or feasible, in particular owing to the numerous practical difficulties in the light of the diversity of relevant national laws. It was also felt that such work would considerably overlap with the topic of diplomatic protection.

131. As regards the second alternative, which consisted in keeping the study within the context of the succession of States but going beyond the problem of nationality to include other questions, some delegations expressed reservations in the light of the problem of the diversity of national laws on the subject. Others, however, supported this approach. In particular, there was the view that the Commission should prepare an instrument, perhaps in the form of a declaration, establishing basic principles for addressing the legal problems connected with the nationality and legal capacity of legal entities affected by a succession of States, and possibly including a savings clause confirming the preservation of the property rights of such entities.

132. There was also a view that it might be useful to draw upon elements of both above-mentioned options as regards the future work on the second part of the topic. The suggestion was made to consider the question of the nationality of legal persons before examining it in the context of the succession of States, or even to begin with a study of the concept of "legal persons" as such.

2. Nationality of natural persons in relation to the succession of States

133. Some delegations commented on the draft articles on nationality of natural persons in relation to the succession of States provisionally adopted by the Commission on first reading at its forty-ninth session. Such work was considered both timely and useful in providing solutions to the problems faced by States. Support was expressed for the general approach adopted by the Commission.

134. As regards the final form of the draft articles, some preferred a declaration, others a convention.

135. It was considered important that the draft articles should not encourage dual nationality. The inclusion in the text of the obligation of States to prevent statelessness was welcomed.

136. Concerning the right of option, the view was expressed that it was a powerful tool for avoiding "grey areas" of competing jurisdictions and that it should be applied to the maximum extent possible. There was also the view, however, that the rights of States should not be reduced excessively to the benefit of the rights of individuals and that States should retain control over the attribution of nationality. In this connection, the point was made that article 10, paragraph 4, was too restrictive.

137. There was a proposal to define the expression "succession of States" in article 2 (a) as "the replacement of one State by another in the responsibility for the administration of territory and its population". Further suggestions on terminology were to harmonize, for the sake of consistency, the text of draft articles 10 and 18 and to use the expression "genuine and effective link" in both, as well as to clarify concepts such as "appropriate legal connection" and "reasonable time limit".

138. As regards the general provisions in Part I, support was expressed for the presumption of nationality in article 4, although it was added that such presumption was subject to any specific arrangements that might be reached by the parties concerned. There were divergent views on the need for the inclusion of article 11. The point was made that,

while the principle of family unity was an important one, habitual residence ought to be considered the most important criterion in determining nationality. It was felt that the issues raised in article 13 were not directly related to the problem of nationality. Support was, however, expressed for the provisions in articles 14 and 15. There was a view that article 18, paragraph 1, overemphasized the principle of effective nationality which had no basis in international law.

139. In respect of Part II, the view was expressed that situations of decolonization should also be addressed, or that, at least, the Commission should specify that the established regime applied *mutatis mutandis* to such situations.

140. The point was made that, in the case of the dissolution of a federal State, the criterion of the nationality of the former constituent unit of the federation should take precedence over that of habitual residence, as demonstrated by recent State practice.

141. Support was expressed for the Commission's approach to only address successions of States occurring in conformity with international law.

F. Reservations to treaties

1. General comments

142. Several delegations reiterated the view that the Vienna Convention on the Law of Treaties established a workable legal regime for reservations applicable to all types of treaties. A special regime of human rights treaties would not make it less universal although it might be useful to consider further an ad hoc reservations regime for human rights treaties if it needed to be adapted to the aims and characteristics of such treaties. This Vienna regime did not require a major revision or any fundamental modification but its possible gaps and ambiguities, especially in the case of inadmissible reservations, needed to be filled and clarified in an exercise of progressive development of international law. The guidelines on the definition of reservations and interpretative declarations seemed therefore useful.

143. It was also noted that entering reservations was a sovereign right of States ensuring the universality of multilateral treaties.

144. Other delegations, while admitting that the work of the Commission on the topic could serve the pressing needs of Governments on their daily business, expressed some reservations about the definitional exercise to the extent that it did not touch questions of legal "substances" on which the Commission had embarked. They advocated some caution on the question of interpretative declarations which might not constitute a separate legal category but merely be a convenient "*porte-manteau*" for statements that were not reservations. They also wondered whether the legal effects of interpretative declarations were an essential part of the Commission's study of the topic.

145. Some delegations felt that, although it was important to undertake a thorough analysis of questions pertaining to reservations, going too much into detail in relation to issues which appeared to be of a more theoretical than a practical interest might result in losing sight of the essential goal, which was the Guide to practice. It was pointed out that the definition of reservations raised various political and legal questions since it raised very fine relative distinctions between reservations and other unilateral statements.

146. According to another view, the subject of reservations to treaties seemed to have attracted a growing interest among States as the recent work in the Council of Europe and the Asian-African Legal Consultative Committee showed. Consequently, an authoritative user's guide prepared by the Commission would be of great practical value.

147. The view was also expressed that none of the three Vienna Conventions gave a comprehensive definition of reservations. In formulating such a definition, the restrictive or "limitative" nature of the reservation should be stressed and a comprehensive list of the moments at which reservations could be made should be established.

148. The consideration of reservations and interpretative declarations in parallel was also supported by several delegations. It was essential that the work of the Commission should provide easily understood guidelines clarifying the differences and similarities between these two notions. It was observed that a conditional interpretative declaration could only constitute a reservation if it was made at the right time and if it was not contrary to the object and the purpose of the treaty.

149. It was also observed that some reservations were so general that it was impossible to reconcile the scope of the reservations with the object and purpose of the treaty concerned or to assess the practical impact of the reservation. This problem was particularly difficult in the case of human rights treaties when the objecting State would like to regard the reserving State as party to the treaty without the reservation, departing thus from the usual effect of the Vienna regime whereby the effect of an objection to a reservation was that the provisions to which the reservation related did not apply between the two States to the extent of the reservations. This "severability" doctrine in human rights

treaties had been applied by a number of countries and it was hoped that it would be reflected in the next report of the Special Rapporteur. However, according to another view, there was little State practice to support the severability doctrine.

150. The view was expressed that although the Vienna regime did not provide any mechanism for assessing whether a reservation was incompatible with the object or purpose of a treaty, this was within the competence of States parties to the treaty and not of treaty bodies, which did not have the power to make determinations regarding the validity or admissibility of particular reservations unless explicitly mandated to do so under the treaty in question. The decision to withdraw or revise a reservation should also lie with the State.

151. It was observed that the Vienna Conventions were unclear concerning the legal aspects of inadmissible reservations, particularly those raised in connection with human rights treaties.

152. It was also observed that the incompatibility of a reservation with the object and purpose of a treaty should be decided in an objective way according to more clearly defined criteria; to leave this matter entirely in the hands of States parties was not always satisfactory and sometimes could be confusing, although it was the exclusive responsibility of the State itself to rectify the defect in the expression of its consent to be bound. This was a particularly important issue in the case of rules of *jus cogens* since reservations would clash with a pre-existing rule which the treaty had embodied. Moreover, the issue was raised as to whether in the case of a prohibited reservation States had to object in order to prevent it from being effective. State practice differed in the field and it was hoped that the Special Rapporteur and the Commission would try to find solutions to that complex problem.

153. It was pointed out that a guide to practice offering practical solutions would necessarily be of a residual nature and would leave the Vienna system intact, becoming a well respected code on reservations.

154. It was observed that a conditional interpretative declaration could only constitute a reservation if it was made at the right time and was authorized by the treaty or was not contrary to its object and purpose. On the other hand, the view was expressed that the interpretation given to the treaty by interpretative declarations should be plausible; otherwise, it would amount to an amendment. The view was also expressed that interpretative declarations often provided the only way for States to subscribe to a general multilateral instrument and should be considered in the light of the specific cultures which influenced the legal regimes of nations. It was also noted that the Commission in its future work on reservations should consider the matter of the obligations of depositaries.

2. Comments on individual guidelines

155. Several delegations welcomed the draft guidelines on definition of reservations and interpretative declarations. It was noted that the fundamental characteristic of reservations was their purpose of excluding or modifying the legal effects of certain provisions of a treaty, while the purpose of interpretative declarations was to clarify the meaning and scope of a treaty or some of its provisions. Many delegations welcomed draft guideline 1.1 (**Definition of reservations**) as combining all the elements contained in the three Vienna Conventions. According to one view, the main purpose was to draw a clear distinction between reservations and other unilateral statements. This definition was well entrenched and was also of great practical importance to States in determining the admissibility of a reservation in State practice, although according to this view it still left room for some degree of uncertainty.

156. It was observed that, as regards the **object of reservations** (draft guideline 1.1.1), if a reservation was too general, as it had become a more common practice recently, especially in the domain of human rights, it could give rise to many difficulties and put into question the will of the reserving State to implement the treaty effectively. Certain delegations endorsed the Commission's intention to re-examine that guideline in the light of the discussion on interpretative declarations, all the more so since the text seemed to be too vague. In order to avoid a possible confusion with certain types of interpretative declarations, reference could be made to the object of modifying or excluding the legal effects of the treaty. Another delegation expressed its concern that the risk of across-the-board reservations would increase substantially with this draft guideline.

157. With regard to draft guideline 1.1.2 (**Instances in which reservations may be formulated**), delegations agreed that it should include all situations envisaged in article 2 of the 1969 Vienna Convention.

158. However, it was also observed that the purpose was not to provide an exhaustive enumeration of all moments at which reservations could be made, as for instance the notification of succession.

159. With respect to draft guideline 1.1.3 (**Reservations having territorial scope**), one delegation drew attention to the fact that the formulation of reservations upon succession was limited to situations where the devolution of the treaty to the successor State did not operate automatically and the notification of succession had rather a constitutive and not a declaratory character. But in cases of "automatic" succession, the successor State became a party to treaty "modified" by the reservation of its predecessor and did not have the right to make new reservations.

160. Another delegation supported the view that upheld the successor State's right to repeal a reservation made by the predecessor State or to make a new reservation upon its notification of succession; since the successor State becomes party to a treaty as from the date of succession, a considerable time might often elapse between these two dates. Another delegation stressed the importance of maintaining the deadlines for the entering of reservations.

161. The view was expressed that unilateral statements by which States proposed to exclude the application of a treaty or some of its provisions to a territory constituted indeed reservations and reflected established practice. Such reservations could be formulated even if not expressly provided for in the treaty to which they related. It was pointed out that the possibility of a State formulating a reservation aimed at limiting the application of the treaty or the legal effect of some of its provisions in regard to a territory should be included.

162. Although several delegations agreed with the substance of the Commission's findings, they called for careful examination of the question of the instance in which that kind of reservation could be made. Moreover, the question of "movable treaty frontiers" was recalled especially in the context of territorial cessions. Since State practice did not give support to the idea of reservations aimed at excluding the application of the rule of movable treaty frontiers, that question should be further considered by the Commission when it addressed the question of reservations to situations of State succession.

163. A view was expressed that the Commission should clarify whether a reservation formulated when notifying territorial application of a treaty would also be admissible if the expansion of the territorial application of the treaty was "automatic", as it was in the case of a transfer of part of a territory between States.

164. In connection with draft guideline 1.1.4 (**Reservations formulated when notifying territorial application**), it was also observed that it might be necessary to limit the draft guidelines to "colonial" situations so they would include only those territories which were subject to the jurisdiction of the reserving State. If the Guide to practice reflected well-established practice it might then not include the uncommon practice of excluding all or part of the State's own territory.

165. A view was expressed that draft guideline 1.1.5, although correct, was not necessarily needed. Draft guideline 1.1.6 seemed to be rather unbalanced and even superfluous, merely restating the substance of the concept of reservation. It was also pointed out that too much work should not be devoted to "extensive reservations". Some delegations agreed with the text of draft guidelines 1.1.5 and 1.1.6 while admitting that they required further clarification.

166. Several delegations thought that unilateral statements relating to non-recognition or substitution should be given further consideration, while according to another view statements of non-recognition were governed by the rules on recognition of States.

167. Many delegations shared the view that the unilateral character of the reservation did not exclude the possibility of States to formulate reservations jointly (1.1.7 **Reservations formulated jointly**). Nevertheless, the question arose whether the withdrawal by one of the States of its reservation give rise to effects for the other States which had formulated it.

168. Moreover, it was noted that the Commission had taken an innovative approach to reservations formulated jointly since it was foreseeable that there would be frequent recourse to such reservations in the near future, especially as a result of the participation of the European Union in an increasing number of multilateral treaties. That approach would also allow the Commission to innovate in the case of interpretative declarations which were not mentioned in the new Conventions.

169. In respect to draft guideline without a title or number for the time being, delegations concurred with the view that a definition of a unilateral statement as a reservation did not render it admissible or valid, or prejudge its admissibility. Only when such a definition has been established would the question of the act's validity be settled, taking into account its legal scope and effect. It was thus useful to clarify and specify the scope of the entire set of draft guidelines adopted thus far. According to one view, the question of admissibility should be linked to the definition of the reservation.

170. Many delegations were of the view that unilateral statements by which a State purported to increase its commitments or its rights in the context of a treaty beyond those stipulated by the treaty itself should not be considered as reservations. However, it was also observed that much

depended on this specific formulation as there might be cases where they could be considered as modifying the legal effects of certain provisions of a treaty. The Commission should examine State practice in that regard.

171. It was observed that the fact that a State or an international organization expressed its willingness to extend its obligations beyond those stipulated by a treaty did not modify the legal effects of any obligation arising under that treaty. Such commitments did not constitute reservations. However, it was further observed that the situation would be different in the case of a State which sought to increase its rights under a treaty. It was important to distinguish between treaty law and customary law; while a State could not modify customary international law to its own benefit by formulating a reservation to a treaty codifying that law, it might be possible to do so in the case of treaty law. The Commission might therefore consider that question as well as the options available to other States parties in such a situation. In such cases, the term "reservation" would not be appropriate, especially in view of the consequences of the application of the reservations regime.

172. It was also observed that such statements in which a State party designed to increase its rights sometimes constituted a derogation from a State's commitments limiting the obligations of their author and could therefore constitute a reservation.

173. According to another view, such statements were merely proposals or offers by a State for amending a treaty and could become binding only after their acceptance by other parties in accordance with the provisions of the treaty or through a "parallel" treaty relationship in addition to the primary treaty.

174. It was also observed that these statements might constitute unilateral acts of State and it was noted that any binding force of such declarations derived not from the treaty itself but from principles of general international law governing unilateral legal acts.

G. Other decisions and conclusions of the Commission

1. General comments

175. Several delegations welcomed the Commission's initiatives to promote greater efficiency in its work and expressed their support for enhancement of the mutually beneficial cooperation between the Commission and other bodies, especially the Sixth Committee. The view was also expressed that the Commission should maintain close relations with the International Court of Justice, whose decisions and advisory opinions played a fundamental role in determining the existence of customary rules and principles of international law. The contribution to codification and doctrine made by regional bodies was acknowledged.

176. The importance of promoting international law through the International Law Commission seminars, particularly for students from developing countries, which should be equitably represented, was also underscored.

177. It was observed that the codification exercise would be effective if its results were embodied in multilateral conventions. Although the Commission seemed to have focused recently more on the formation of principles, guidelines or model rules whenever appropriate, it should not lose sight of the fact that codification should be aimed at the elaboration and systematization of customary rules in the form of legally binding international conventions.

178. The hope was expressed that the Commission would be able to make progress on the topics on its current agenda, especially the topics of State responsibility, international liability for injurious consequences arising out of acts not prohibited by international law, and nationality and succession of States.

179. It was also announced that the complete series of Gilberto Amado Memorial Lectures had recently been published to mark the Commission's fiftieth anniversary and that the entire series would be made available on the Internet.

180. A number of delegations expressed the wish that advance copies of the forthcoming reports of the Commission could be made available at the ILC Web site, thus facilitating the analytical work of Governments.

181. Reference with appreciation was also made to the organization of the seminar commemorating the Commission's fiftieth anniversary as well as to the publications *Making Better International Law: The International Law Commission at 50*, and *Analytical Guide to the Work of the International Law Commission*.

182. It was agreed that the Commission had maintained in its work a correct balance between progressive development and codification. It was suggested that Special Rapporteurs should present to the Sixth Committee their ideas on how the Committee's examination of the Commission's report might be best conducted. Moreover, an itemization of the principal issues involved in each topic might provide a useful framework for a fruitful discussion.

2. Long-term programme of work

183. Many delegations supported the criteria for selecting the topics to be included in the long-term programme of work and felt that the Commission should not limit itself to traditional topics but should also consider questions pertaining to recent State practice. It was also observed that each of the topics proposed seemed clear and well focused. They should thus be easily completed within a few years.

184. Delegations welcomed the inclusion of topics such as: responsibility of international organizations, effects of armed conflicts on treaties (focusing on international rather than domestic conflicts), expulsion of aliens, and shared natural resources.

185. Regarding the future of the topic of international liability, the view was expressed that the Commission should follow the second part of the study focusing on principles of civil liability (including liability of non-State actors for transboundary physical harm) and on a State's international liability and the specific relationship between the two. Such an approach would be more germane to the realities of international life which were increasingly shaped, especially in the economic sphere, by corporations and even individuals.

186. In relation to the thought that the Commission should take up issues related to international environmental law, the idea was also expressed that the term "transboundary resources" would be preferable to "shared natural resources". Thus, the Commission could study the issue of groundwater and transboundary deposits.

3. The question of split sessions

187. A view was expressed that the 1998 split session had been a success since the Commission had completed both the set of 17 draft articles on prevention of transboundary damage from hazardous activities and the draft guidelines on reservations to treaties and had offered the possibility to legal advisers of permanent missions at New York to observe the work of the Commission and to meet its members. According to this view, it was regrettable that financial constraints made it impossible for the Commission to continue to meet in split session and it was hoped that the future budget would provide funding to allow this practice to be resumed.

188. The suggestion was made that, in future, the Commission should hold 10 meetings per week (instead of 8), thereby shortening the total length of its sessions by one week for every six.

189. Some delegations supported the Commission's decision to hold a single session in Geneva in 1999 and another split session in 2000. In their view, the Commission should be allowed to decide on its schedule of work, which would make it more efficient and effective.